

Laborers International Union of North America, Local No. 282, AFL-CIO (The Austin Company) and Lula Allen. Case 14-CB-5939

7 August 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 11 January 1984 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions, but not to adopt the recommended Order.²

In formulating his remedy, the judge concluded that, in addition to the traditional make-whole requirements, the Respondent should be directed to make Allen whole "for any added income tax obligation on her part resulting from payment to her of any sums due hereunder in a lump sum, rather than as and when originally due and payable, so as to increase the amount of her tax liability through tax bracket or otherwise in consequence of such delayed lump sum payment." The judge noted that a lump sum payment of backpay can "be substantially detrimental to the innocent employee through forcing the employee into a higher income tax bracket, thereby reducing the employee's net income he or she would have derived if he or she had been paid on time." Because that result would be a direct consequence of the nonpayment of moneys which would have been paid but for the Respondent's unlawful actions, the judge concluded that it was "utterly clear that the Respondent who brought that about should indemnify the innocent employee for any such loss."

We disagree with the judge's analysis. The issue of a discriminatee's income tax obligation upon receipt of a backpay award is addressed in sections 10648-10649 of the Board's Casehandling Manual

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall issue an Order in lieu of that recommended by the judge to correct certain inadvertent errors, including his failure to require the Respondent to remove from its files any reference to Lula Allen's termination.

(Part Three—Compliance Proceedings). In particular, section 10648.9 directs that a discriminatee should be advised that the responsibility for determining the exact amount of income tax due rests with the discriminatee and requires, in pertinent part, that the Board agent inform the discriminatee "that if the backpay renders the total annual income for the year substantially in excess of normal income and thereby places [the] discriminatee in a higher tax bracket, the individual may be entitled to a reduced formula for computing income for that year and to consult the local Internal Revenue Service Office for information concerning the computation of taxes for the year."

Sections 1301 through 1305 of the Internal Revenue Code (26 U.S.C. 1301 et seq.) allow a taxpayer having unusual fluctuations in income to use an averaging device to ease the tax liability in peak income years. The device is reflected in a complicated computation performed by the taxpayer to pay the total of (1) the tax due on 120 percent of average income over the 4 preceding years ("average-base period income") and (2) the tax due on "averagable income"—defined as taxable income in the current year less 120 percent of average base period income.³

We believe that the availability of income averaging coupled with the responsibility imposed on the Regional Offices to inform discriminatees that they may be entitled to a reduced tax formula sufficiently meet the concerns expressed by the judge, and that no further remedial action is required.

ORDER

The National Labor Relations Board orders that the Respondent, Laborers International Union of North America, Local No. 282, AFL-CIO, Cape Girardeau, Missouri, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Taking or threatening to take any adverse job action or other restraining or coercive action against any employee for exercising his or her right to support, favor, campaign, and vote for any rival candidate or slate in opposition to the incumbent union slate at or in connection with any union election.

(b) Taking or threatening to take any adverse job action or other restraining or coercive action against any employee for failing or refusing to contribute to any political action or similar fund, tax, dues, levy, or exaction.

³ There are certain limitations on the use of income averaging relating to such matters as self-support and marital status.

(c) Causing or attempting to cause The Austin Company, or any other employer, to lay off or otherwise discriminate against its employees in violation of Section 8(a)(3) of the Act because of their engaging in activities protected under Section 7 of the Act, in order to encourage or discourage membership in any labor organization.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Lula Allen whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in this decision.

(b) Notify The Austin Company, in writing, and furnish a copy of such notification to Lula Allen, that it has no objection to Lula Allen's return to the employment of The Austin Company in the job from which she was terminated on 25 March 1983.

(c) Refer Lula Allen to The Austin Company for employment, or, if such employment is no longer available, refer her for employment elsewhere in a substantially equivalent position to that from which she was terminated on 25 March 1983.

(d) Remove from its files, and ask The Austin Company to remove from The Austin Company's files, any reference to the unlawful termination, and notify Lula Allen in writing that it has done so and that it will not use the termination against her in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all of its job referral and related records and entries necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its offices, union halls, and other places of business copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

⁴ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Forward to the Regional Director for Region 14 signed copies of the notice for posting by The Austin Company, if it is willing, at its Cape Girardeau, Missouri jobsite in places where notices to employees are customarily posted.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT take or threaten to take any adverse job action or other restraining or coercive action against any employee for exercising his or her right to support, favor, campaign, and vote for any rival candidate or slate in opposition to the incumbent union slate at or in connection with any union election.

WE WILL NOT take or threaten to take any adverse job action or other restraining or coercive action against any employee for failing or refusing to contribute to any political action or similar fund, tax, dues, levy, or exaction.

WE WILL NOT cause or attempt to cause The Austin Company, or any other employer, to lay off or otherwise discriminate against any of you to encourage or discourage membership in this or any other labor organization.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify The Austin Company, in writing, that we have no objection to the employment of Lula Allen, and WE WILL furnish Lula Allen with a copy of that notification.

WE WILL refer Lula Allen back to her job with The Austin Company. If that job no longer exists, WE WILL refer Lula Allen to a job equivalent to

the job from which she was terminated by The Austin Company at our behest on 25 March 1983.

WE WILL notify her that we have removed from our files, and have asked The Austin Company to remove from The Austin Company's files, any reference to her termination and that WE WILL NOT use the termination against her in any way.

WE WILL make Lula Allen whole for any loss of earnings and other benefits resulting from our discrimination against her, less any interim earnings, plus interest.

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL UNION
No. 282, AFL-CIO

DECISION

PRELIMINARY STATEMENT—ISSUE

STANLEY N. OHLBAUM, Administrative Law Judge. This proceeding¹ under the National Labor Relations Act was litigated before me in St. Louis, Missouri, on October 4, 1983, with all parties participating throughout by counsel afforded full opportunity to present evidence and contentions as well as to file posttrial briefs and proposed findings and conclusions (received by November 7, 1983). All have been carefully considered.

The principal issue presented is whether Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by causing The Austin Company, Employer of Charging Party Lula Allen, about March 25, 1983, to lay off Allen from her job with The Austin Company at the latter's Cape Girardeau, Missouri jobsite and not to recall her because she supported and assisted opponents of the Union's existing incumbent officers in intraunion elections; for reasons other than Allen's failure to tender periodic dues and initiation fees and/or referral fees uniformly required as a condition of acquiring or retaining membership in and/or job referrals through the Union; and for unfair, arbitrary, and invidious reasons and in breach of its fiduciary obligation to fairly represent employees.

On the entire record and my observations of the testimonial demeanor of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times Respondent Union has been and is a labor organization as defined in Section 2(5) of the Act.

At all material times, Charging Party Lula Austin's Employer, The Austin Company, an Ohio corporation engaged in general construction contracting, has main-

¹ Based on a consolidated complaint issued June 10 (as amended October 4), growing out of a charge filed April 18, 1983, by Charging Party Lula Allen. This proceeding (Case 14-CB-5939) was consolidated on June 10, 1983, with Case 14-CB-5429, which was severed on October 4, 1983, and all references thereto deleted from the amended consolidated complaint.

tained offices and jobsites throughout the United States, including an office and place of business in Clayton, Missouri, and a jobsite at Cape Girardeau, Missouri, locus of the violations alleged herein. During the representative 12-month period ending May 31, 1983, immediately antedating issuance of the complaint, The Austin Company, in the course and conduct of its business operations, performed services in States other than Missouri valued in excess of \$50,000. I find that at all material times The Austin Company has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts as Found*

About 1979 Lula Allen, a female with a husband out of work, became a member of Respondent Union, which has no physical strength, capacity, stamina, or comparable admission requirements and which professes ("National Agreement," R. Exh. 1, p. 3, art. V, secs. 2 and 4) not to exercise or participate in sexual or other employment discrimination. Thereafter, in 1981, she was referred through Respondent Union's hiring hall to a work jobsite of J. S. Alberici Construction Company, Inc., in Marston, Missouri, where she worked, satisfactorily and without incident, for some 8 months under Foreman and Union Agent Joe W. Smith (who figures in Allen's later discharge at the Austin Company jobsite at Cape Girardeau, to be discussed below) until her work there ended some 10 months later. Subsequently, again through Respondent's hiring hall, she was placed at the Cape Girardeau jobsite of The Austin Company, where she started to work, as a laborer, on December 13, 1982, being the fourth person hired there and the third of three referred by the Union² and therefore having considerable seniority there.

Allen worked there under Foreman Cochran for a day or two, then under Union President Sachse for over a month, then Bratton (later union auditor) for around a month, and then finally under Union Foreman and Agent (and later Union Executive Board Member) Joe W. Smith—under whom, it will be recalled, she had worked satisfactorily for some 8 months at the Alberici Company's Marston jobsite—until her layoff on March 25, 1983, here in issue. Although Allen worked primarily as a carpenter's helper³ at Cape Girardeau (as she had at Mar-

² The employees previously hired there were Elmer F. Elfrank, not referred by the Union, who was hired on November 23 and released on December 8, 1982; Ernest L. (Ernie) Brown, union auditor and union steward referred by the Union and hired on November 24, 1982; and Tom R. Cochran, referred by the Union and also hired on November 24, 1982. Two others, likewise referred by the Union, were hired on the same day as Allen (December 13, 1982); these were Union President Joseph M. (Joe) Sachse and Union Steward (soon also to become Union Auditor) Charles E. Bratton, both of whom were released or terminated prior to Allen's termination (under circumstances to be described) on March 25, 1983 (Sachse was released on February 10 and Bratton quit on March 4, 1983). (See G.C. Exh. 3.)

³ As described at the trial, carpenters' helpers remove nails from lumber, and stack and move lumber and forms.

ston), she also assisted with shoveling gravel, dirt, and sand, at measuring the depths of holes excavated by a backhoe operator, and at unloading trucks.

Allen paid her monthly union dues as required, as well as "supplemental dues," taken out of her pay, for operation of the union hiring hall. She was also asked to make contributions of \$2 per week "PD" to a union "Political Fund," and for a while she did so. In early March 1983, however, shortly before she was terminated from her job on suggestion or behest of the Union, under circumstances which will be shown, when requested by Union Auditor Brown to pay her "PD," she indicated she might not be able to do so for a few months because of financial stringencies, but Brown indicated that she had to do so because "we have to keep this [PD account] book straight." About a week later, Union Official Auditor Brown again approached Allen for her required "PD" payment, warning her, "You know it's going to hurt you if you don't." When Allen again pointed out that she could not afford it, Brown again indicated it was to be paid, adding, "You'd better keep your nose clean." When, a day or so later, junior jobsite laborer Riley approached Union Auditor Brown to pay his "PD," Brown asked Union President Sachse where to put Riley's name in "the book." Sachse directed Brown to "mark Lula's [i.e., Allen's, who had not paid her PD] name off and put Riley's name in her place."

In late February-March 1983 (also shortly before Allen's termination), Allen learned that Jerome P. (Roe or Ro) Schlitt, another Cape Girardeau jobsite laborer, intended to run in the upcoming intraunion elections to attempt to unseat James P. (Jimmie) Bollinger, the Union's repeated incumbent business agent/business manager. Allen decided to support Schlitt in this endeavor and attended all four of his campaign meetings, which were held at his home commencing the first week in March (the month of Allen's termination). On the morning of the day following Schlitt's first campaign meeting, Union Auditor Brown approached Allen while she was working on the jobsite and asked her if she had been to Schlitt's meeting the night before. When Allen admitted she had, Brown asked her how many others had been there (there were about 25 or 30) and whether she intended to go to any more of those meetings. When she indicated she might since "he has guts enough to run," Union Auditor Brown said that Schlitt "[will] never win" and cautioned Allen that "You're just going to stick your neck out for nothing." When Allen thereupon said, "I think I'm going to vote for him," Brown praised incumbent Business Agent Bollinger and warned Allen that "Jim [Bollinger] helps them that help him . . . [You'd] better keep [your] nose clean . . . If you vote for 'Roe' [Schlitt], you gotta go."⁴

In early March 1983, after Allen had been on the Cape Girardeau job for months and after a previous stint of almost a year on the same kind of work at the New Madrid job, Union President Sachse began to twit her about being unable to do a "man's job," an insinuation

she denied. Sachse thereupon asked her whom she was going to vote for in the upcoming union election,⁵ adding that "Roe [Schlitt will] never win" and praising incumbent Business Agent Bollinger. When Mrs. Allen told Union President Sachse that she did not like the "unfair" way Bollinger referred workers to jobs from the "referral list" and asked Sachse to explain how the apparent favoritism in job referrals was accomplished, Sachse responded merely that "We've got ways to get people on the jobs" and that the Union had employers claim they had requested certain union-favored and dispatched individuals "by name," and reiterated, finally, "If [you] vote[d] for 'Roe' [Schlitt], you'd have to go . . . Anybody that vote[s] for 'Roe' [Schlitt] would be hurting themselves."

Shortly thereafter, around mid-March 1983, Union Foreman and agent (and soon to become Union Executive Board Member) Smith—then, as well as previously at the New Madrid jobsite, Allen's foreman—also asked Allen whom she was going to vote for. She responded that she had not made up her mind. Smith thereupon criticized Schlitt, adding that "I hope 'Roe' [Schlitt] does get around 100, 125 votes. . . cause that's just that many people I won't have to fool with. We don't want any fence riders either. You're either for us or against us."

On March 25, 1983, after completion of some assigned work, when Allen asked Union Foreman and agent (soon to become Union Executive Board Member) Smith what to do next, without any prior notice or intimation whatsoever Smith told Allen, "You've just been laid off." He added, "I didn't know there was going to be a layoff. . . I didn't have anything to do with your layoff."⁶ Allen remarked that "I knew . . . it was just a matter of time [because of] the way they had been harassing me and riding me and telling me all this stuff." Allen thereupon immediately sought out Austin Company Cape Girardeau Job Superintendent "Ron" Diehl, who stated to her that he "didn't have a thing to do with it. . . Joe Smith had recommended [your] layoff," adding that Diehl had "no complaints against your work." The Austin Company engineer, standing by, reminded Allen that "I've told you before . . . the Union's cutting your throat."

Since her described March 25, 1983 termination, Allen has at no time been recalled or referred to any job by Respondent Union, even though, according to Austin Company Cape Girardeau Project Superintendent Peter Holster, the laborers' work component there has risen from 12-14 in March 1983 to 34 in October 1983.⁷ At no

⁵ To be held on May 21, 1983, thus seemingly indicating that the Union was in early March contemplating that Allen would still be in her job at election time under appropriate circumstances, i.e., at any rate if she supported incumbent Bollinger rather than Schlitt and otherwise kept her "nose clean" as she had been warned.

⁶ Credited evidence establishes, as shown below, that this was clearly untrue, since it was Smith who designated and selected Allen for layoff.

⁷ When, about 10 days after the layoff of Allen, her Employer, The Austin Company, called on Respondent Union to supply six laborers and explicitly reminded the Union that Allen had not been discharged and that it had "no objection to [her] being redispached," the Union later, through President Sachse, inquired of Company Project Manager Peter

Continued

⁴ Indeed, this was incumbent Union Business Agent/Manager Bollinger's campaign slogan, heard repeatedly by Allen: "You Vote for 'Roe' [Schlitt], You Gotta Go."

time prior to her termination had Allen's work performance been criticized.

There is no indication that laborer Riley, who was hired on the job on March 3, 1983, long after Allen, and whose name, it will be recalled, at Union President Sachse's direction, replaced that of Allen in the Union's "Political Fund" book as a contributor, was at any time terminated, laid off, or furloughed from the job. (See G.C. Exh. 3.)

The foregoing account of Allen's termination is based largely on her testimony, which I credit because of my conviction, based on my close observation of her testimonial demeanor, that it is true. Her sincerity shone through her testimony, which is further corroborated by that of other witnesses including officials of her Employer, The Austin Company, who likewise impressed me extremely favorably based on its closely observed testimonial demeanor—in marked contrast to most of the testimony of Respondent's witnesses, chiefly its own interested officials. Thus, it is crystal clear and I find—nothwithstanding Union Foreman, agent, and Executive Board Member Smith's testimony to the contrary, which I would in any event discredit, in this aspect, based on my close testimonial demeanor observations of him as he testified on this particular subject—that it was Union Foreman and agent Smith, and *not* any official or agent of Allen's Employer, The Austin Company, who selected or designated Allen for termination or layoff. When Respondent's Cape Girardeau Job Superintendent Roland (Ron) Kent Diehl, as he credibly testified, decided because of a temporary engineering or supply problem to lay off two laborers for a few days, he so informed Union Foreman and agent Smith, adding that Diehl wished one of them to be Larry Gaines and for Smith to designate the other. When Smith designated Allen, Diehl demurred, not only because, as he testified, he had observed and was satisfied with Allen's job performance, but also because "she was the only woman," union agent Smith nevertheless insisted that Allen be the other employee to be terminated and that Smith would "handle all the trouble." Diehl later reluctantly and against his own better judgment acceded to Smith's insistence that Allen be terminated. As already stated, Diehl testified

Holster whether it was calling for Allen "by name." When Holster reminded Sachse that it was contrary to the Company's policy to call for any laborer "by name" and that it had never done so (explicitly in that way) but that he nevertheless again wished to point out to Sachse that Allen (as well as the other laborer, Larry Gaines, laid off at the same time) had not been discharged but merely temporarily laid off and that the Company had no objection to her (and his) return to her (and his) job, Respondent Union nevertheless did not return, refer, or redispach Allen to her job with Austin Company, it being Respondent Union's contention that it was precluded from doing so because of an internal hiring hall "work rule" of the Union to the effect that an employee who continues in layoff status for 5 days drops to the bottom of the Union's work referral list and will not be referred unless the employer explicitly and specifically asks for him or her "by name," and it being the Union's further contention that an employer's reference to given employees accompanied by a statement that it had "no objection" to their return to their jobs after their very recent temporary layoff was not, in the Union's estimation, a request for them "by name." The alleged hiring hall "work rule" in question was not produced at the instant trial, although Respondent had and was afforded ample opportunity to do so. Furthermore, it was in no way shown that The Austin Company was a party to or agreed to or acquiesced in any such "rule" or practice.

here that he had observed and was satisfied with the work performance of Allen, and he further testified that so far as Diehl was concerned he would *not* have laid off or terminated Allen. I credit Diehl's testimony.

Thus, it is entirely clear and I find, rejecting Respondent Union's "proof" to the contrary, that it was Respondent Union and *not* Allen's Employer, The Austin Company, which was responsible for and brought about Allen's layoff or termination on March 25, 1983.⁸

Based on my close comparative testimonial demeanor observations, I unequivocally reject the testimony put forward by Respondent Union to the effect or suggestion that Allen was unfit to perform, incapable of performing, or inefficiently or unsatisfactorily performed, her job and work. To begin with, the Union imposed no physical qualifications or standards for admission or job referral. It was not shown, and there is no reason to suppose, that some men on the job possessed more physical capability than Austin to do the tasks assigned to her. I reject the carping and in many cases trifling, tongue-in-cheek, criticisms of Austin's competency allegedly recollected and dredged up at the trial by Respondent's officials—these could either be equally applicable to male laborers,⁹ or were grossly exaggerated or overblown, or were so minor and inconsequential in any event¹⁰ as not worthy of mention. Insofar as laboring tasks, if any, requiring "extraordinary" strength or height or other bodily configuration were or may have been concerned, since there was no showing that they were not also beyond the capability of "ordinary" male laborers, no reason has been shown why such tasks, if there were any, could not be or were not in fact assigned to laborers (male or female) possessing the "extraordinary" capability required. It is additionally to be observed that the Respondent's own "National Agreement" specifies that "The Employer shall be the sole judge of the competency and qualifications of individuals referred by the Union" (R. Exh. 1, p. 3, art. V, sec. 3), and that the testimony of the Employer's Job Superintendent Diehl, as shown above, persuasively establishes that Respondent was thoroughly satisfied with Allen's work competency, qualifications, and performance; that he had never received any complaint or adverse report concerning her work performance; and that, in addition to what has already been quoted above,

⁸ I reject the testimony of Respondent Union's International representative Edward Smith, its business agent Bollinger, and its president Sachse concerning alleged admissions to the contrary by Austin Company Officials Diehl, Peter Holster, and Neil D. McArthur, denied by the latter under oath at the instant trial, since, based on testimonial demeanor as closely observed, I much prefer the testimony of Holster, McArthur, and Diehl to that of Edward Smith, Bollinger, and Sachse.

⁹ Such as, in one case, involving the starting of a Diesel engine hard for *anybody* to start in cold weather, since it lacked a warmup device—as credibly attested to by the General Counsel witness Schlitt, who readily admitted that he as well as many other male employees had difficulty with it. Schlitt also testified credibly that he has been a foreman with various laborers including Allen under him, that he has observed Allen's work performance, that he had "no [ne] [problems] whatsoever" with her, that she had no observable physical or other infirmity or difficulty, and that she did every kind of work the male laborers did. I credit Schlitt's testimony.

¹⁰ Such, for example, as occasionally pulling or dragging lumber (without damaging it) "instead of" lifting and carrying it without touching the ground.

when Diehl was asked at the trial whether Allen's "job performance was in question . . . as far as the Company was concerned," he responded with an emphatic and resounding, "No, sir." Finally, it is to be noted that Union Foreman, agent, and Executive Board Member Smith, who brought about Allen's termination, himself conceded at the trial that "[T]here was nothing wrong with her [Allen's] work" (Tr. vol. II, p. 166).

Under these circumstances, I further find that Allen was not laid off or terminated on March 25, 1983, based on or for any reason related to her work performance, but *only* because Respondent Union through its agent Joe W. Smith designated her for layoff or termination for a reason or reasons unrelated to her work performance and wholly unrelated to any proper, lawful, fair, noninvidious, or nondiscriminatory reason.

B. Rationale and Resolution

Respondent Union is here alleged to have violated Section 8(b)(1)(A) and (2) of the Act. A union violates Section 8(b)(1)(A) if it "restrain[s] or coerce[s] . . . employees" in the exercise of the rights guaranteed in Section 7 of the Act.¹¹ A union violates Section 8(b)(2) if it "cause[s] or attempt[s] to cause an employer to discriminate against an employee in violation of subsection [8](a)(3)."¹²

Here Respondent Union violated both. It violated Section 8(b)(1)(A) when, through its actions as described and found in bringing about the termination of Allen, it restrained and coerced her and her fellow employees in the exercise of her and their rights to oppose the incumbent union hierarchy and to support a rival candidate (Schlitt), as well as in the exercise of her and their right not to contribute to a "political fund" ("PD") set up by the Union. It is beyond contention that Allen and her fellow employees were thereby restrained and coerced by Respondent Union since for those reasons—no other reason having been established—it brought about Allen's termination, thus making its handiwork directly effective over her, as well as making the restrainful and coercive message of that termination dramatically clear to her fellow employees. The Union also violated Section 8(b)(2)¹³ by causing Allen's Employer, The Austin Company, to discriminate against her by laying her off or terminating her so as to encourage or discourage her (and other employees') membership in the Union through demonstrating the Union's "clout" in bringing about the termination of Allen for reasons wholly unrelated to her

work performance but related only to her exercise of her rights under Section 7 of the Act.

The General Counsel having established a clear prima facie case of violation of the Act on the part of Respondent Union, it devolved on Respondent Union to establish through preponderating credible evidence, under the principle promulgated by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), which I believe and hold to be controlling here as it would be in a case of an alleged 8(a)(3) violation, that it did not bring about the termination of Allen for a proscribed reason. Thus it failed to do so. Since, for reasons explicated above, I have rejected Respondent Union's claims that it was not responsible for Allen's termination, and that her termination was due to her inefficient work performance, no reason remains for that termination other than the unlawful reasons established prima facie by the General Counsel.

It is well established that a union which, as here, restrains or coerces employees in the exercise of their Section 7 rights violates Section 8(b)(1)(A) of the Act. See, e.g., *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 674-675 (1961); *Carpenters (Daniel Construction)*, 227 NLRB 72, 81 (1976); *International Packings Corp.*, 221 NLRB 479, 484 (1975), enfd. 542 F.2d 1163, 94 LRRM 2125 (1st Cir. 1976); *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1 (1972); *Engineers Local 4 (Carlson Corp.)*, 189 NLRB 366 (1971), enfd. 456 F.2d 242 (1st Cir. 1972); *Carpenters (Harold E. Picou)*, 182 NLRB 49 (1970), enfd., 444 F.2d 254 (5th Cir. 1971); *Teamsters Local 923 (Yellow Cab)*, 172 NLRB 2137 (1968); *Hod Carriers Local 300 (Desert Pipeline)*, 145 NLRB 1674, 1678 (1964).

It is also well established that a union which, also as here, causes the discharge of an employee for discriminatory and invidious reasons to demonstrate its "clout," and thereby to steer employees into (or away from) union membership, violates Section 8(b)(2) of the Act. See, e.g., *Food & Commercial Workers Local 454 (Central Soya of Athens)*, 245 NLRB 1295 (1979), enfd. 108 LRRM 2280 (1980); *Carpenters (Daniel Construction)*, 227 NLRB 72 (1976); *Teamsters Local 860 (Admiral Corp.)*, 195 NLRB 68 (1972); *Iron Workers Local 350 (Atlantic Building Assn.)*, 164 NLRB 644 (1977); *Teamsters Local 5 (Ryder Truck Lines)*, 161 NLRB 493 (1966), enfd. 389 F.2d 757 (5th Cir. 1968); *Carpenters Local 742 (J. L. Simmons Co.)*, 157 NLRB 451 (1966), enfd. 377 F.2d 929 (D.C. Cir. 1967), cert. denied 389 U.S. 843 (1967); *Plumbers Local 100 (Beard Plumbing)*, 128 NLRB 398 (1960), enfd. 291 F.2d 927 (5th Cir. 1961).

It is accordingly determined that, through its described actions as found in section III, A, supra, in bringing about the layoff and termination of Lula Allen from her job with her Employer, The Austin Company, at its Cape Girardeau, Missouri jobsite on March 25, 1983, Respondent Union violated Section 8(b)(1)(A) and (2) of the Act.

A somewhat more difficult question is whether Respondent Union further violated the same portions of the Act through its failure and refusal since the date (March 25, 1983) it brought about Allen's termination, to refer her back to that or any other job because of its so-called,

¹¹ Employees' Sec. 7 rights include "the right to self-organization, to . . . join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" as well as the right to refrain from any or all such activities."

¹² Sec. 8(a)(3) forbids employers to "discriminat[e] in regard to hire or tenure of employment to encourage or discourage membership in any labor organization."

¹³ But not, as alleged in par. "5C" of the complaint, as amended, the portion of Sec. 8(b)(2) pertaining to "discrimination against an employee with respect to whom membership in [the Union] has been denied or terminated, as alleged in that complaint paragraph, since there is no showing that Allen has at any time been denied continued membership in Respondent Union, of which, she testified, she remains a member.

alleged 5-day rule referred to above.¹⁴ As indicated there,¹⁵ the facts concerning that so-called rule, what it is if it is, whether it applies here, whether—in view of the testimony of Respondent's own witness Burton (Tr. vol. II, p. 125)—the “rule” was honored in the breach as well as observance, and whether Allen's employer's, The Austin Company's indication of its willingness to return Allen to her job was sufficient to trigger an obligation on Respondent Union's part to refer her back, are somewhat murky. In view of the determination here that Allen's March 25, 1983 layoff was caused by Respondent Union, it is unnecessary to grapple with the question of whether the Union's conceded failure and refusal to return her to her job or otherwise refer her for employment comprised further violation of the Act, since the remedy would be no different whether Respondent was right or wrong in its purported application of its alleged “5-day rule.” It being entirely clear that Respondent's unlawful selection and designation of Allen for termination on March 25, 1983, formed the predicate for its professed inability to refer her back to her job under its so-called 5-day rule—even though her Employer explicitly indicated willingness to have her back, thereby inviting the Union to do so—it is Respondent Union, and not Allen, who should shoulder responsibility for the consequences of its illegal actions in bringing about her termination, for if that unlawful termination had not occurred its alleged “5-day rule” would not have been called into play at all. Judge Learned Hand's reminder that “it rest[s] upon the tortfeasor to disentangle the consequences for which it [is] chargeable” (*NLRB v. Remington Rand*, 94 F.2d 862 at 872 [2d Cir. 1938]) is singularly apt here. Under the circumstances shown, whether or not Respondent Union's alleged 5-day rule is applicable here to Allen, it will in neither event affect the remedy and the extent of Respondent Union's backpay liability to her, and I so determine.

On these findings and on the entire record, I state the following

CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted here.

B. Through its actions, described and found in section III, supra, Respondent Union has violated and continues to violate Section 8(b)(1)(A) and (2) of the Act.

C. Said violations and each of them have affected, are affecting, and, unless permanently restrained and enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.¹⁶

¹⁴ Supra at fn. 7.

¹⁵ Id.

¹⁶ Respondent's proposed findings and conclusions are allowed only to the extent consistent with the findings and conclusions made in this decision; and its proposed Order is rejected.

REMEDY

Respondent Union should be required to cease and desist from violating the Act in the respects found, as well as in like or related respects. Respondent should also be required to take the affirmative measures required in cases of this nature; namely, formal written withdrawal of any objection to the reemployment of Allen, prompt referral of Allen to her previous job (or, if it no longer exists, equivalent employment), and making her whole for all sums and benefits lost by her in consequence of her unlawful ouster from her job on and since March 25, 1983, plus interest, computed as explicated in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977). The make-whole remedy should encompass not only backpay until Allen's restoration to equivalent employment (see *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1981)), but also restoration of seniority and all benefits and entitlements lost by reason of the unlawful ouster, including lost holiday and vacation benefits and overtime if any, and also recompense for any expenses incurred by reason of any cancellation of health or other insurance policies or coverages in consequence of her ouster. In brief, Allen should in all respects be restored to the position and status she would have occupied if she had not been unlawfully ousted from her job. She should also be made whole by Respondent for any added income tax obligation on her part resulting from payment to her of any sums due hereunder in a lump sum, rather than as and when originally due and payable, so as to increase the amount of her tax liability through a change in her income tax bracket or otherwise in consequence of such delayed lump sum payment.¹⁷ Respondent should further be required to preserve and open its books and records to the Board's agents for backpay and compliance determination purposes. Finally, Respondent should be required to post the usual informational notice to members.

[Recommended Order omitted from publication.]

¹⁷ Cf. *Sears v. Atchison, Topeka & Santa Fe R.R.Co.*, 31 EPD para. 33, 388 (U.S.D.C. Kans. 1983). Board and courts have repeatedly pointed out that the purpose of backpay is to make the unlawfully treated employee whole. Payment to such employee of backpay in a delayed large sum could be substantially detrimental to the innocent employee through forcing the employee into a higher income tax bracket, thereby reducing the employee's net income he or she would have derived if he or she had been paid on time. Since that result would be a direct consequence of the nonpayment of moneys due on time, when they would and should have been paid but for Respondent's unlawful actions in preventing that, it seems utterly clear that the Respondent who brought that about should indemnify the innocent employee for any such loss. The foregoing is the rationale for including the indicated requirement in the remedial order here.